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Right of peoples to self-determination

Use of mercenaries as a means of violating human rights and impeding the exercise of the rights of peoples to self-determination

Note by the Secretary-General

The Secretary-General has the honour to transmit to the members of the General Assembly, in accordance with Commission on Human Rights resolution 2005/2 and Human Rights Council resolution 33/4, the report of the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination.

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Report of the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination

Summary

The present report is submitted pursuant to the mandate of the Working Group, which is to monitor the phenomenon of mercenaries, mercenary-related activities and the activities of private military and security companies and their impact on human rights. In its resolution 33/4, the Human Rights Council emphasized utmost concern regarding the impact of the activities of private military and security companies on the enjoyment of human rights, in particular when, inter alia, operating in privatized prisons and immigration-related detention facilities. In that resolution, the Council noted that such companies and their personnel were rarely held accountable for violations of human rights, particularly the right to self-determination. In this connection, the Working Group focuses the present report on the use of private security companies in places of deprivation of liberty, with attention given to the resulting impact on human rights. The Working Group highlights that the profit motives of private security operators often override human rights considerations, leading to situations in which human rights violations are likely to be committed with impunity against those deprived of their liberty, with little or no recourse to effective remedies for victims.

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I. Introduction

1. The present report is submitted in accordance with General Assembly resolution 71/182 and Human Rights Council resolution 33/4. The report is linked to the mandate of the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination. That mandate was established to monitor the phenomenon of mercenaries, mercenary-related activities and the activities of private military and security companies and their impact on human rights. In its resolution 33/4, the Human Rights Council emphasized its utmost concern about the impact of the activities of private military and security companies on the enjoyment of human rights, in particular when, inter alia, operating in privatized prisons and immigration-related detention facilities. In that resolution, the Council further noted that such companies and their personnel were rarely held accountable for violations of human rights. In this connection, the Working Group decided to focus the present report on the use of private security companies in places of deprivation of liberty, with attention given to the resulting impact on human rights.

2. Since its establishment, the Working Group has focused extensively on, inter alia, the need for robust regulation of private military and security companies, with particular emphasis on ensuring accountability for human rights violations committed by company personnel. The Working Group's decision to assess the privatization of places of deprivation of liberty and the resulting impact on human rights was also based on recognition of regulatory gaps in national legislation relating to private military and security companies and thus of the risk of impunity for human rights violations committed by company personnel.

3. The Working Group has defined a private military and security company as "a corporate entity which provides, on a compensatory basis, military and/or security services by physical persons and/or legal entities". For the present report, the Working Group focuses particularly on for-profit private security companies operating in prisons and detention facilities for migrants. The Working Group generally defines security services to include "armed guarding or protection of buildings, installations, property and people, any kind of knowledge transfer with security and policing applications, development and implementation of informational security measures and other related activities". Military services refer to "specialized services related to military actions, including strategic planning, intelligence, investigation, land, sea or air reconnaissance, flight operations of any type, manned or unmanned, satellite surveillance, any kind of knowledge transfer with military applications, material and technical support to armed forces and other related activities".

4. In preparing the report, the Working Group sent out questionnaires to States, civil society organizations and relevant stakeholders to request information on the use of private security companies[1] in places of deprivation of liberty. In the questionnaire, the Working Group requested information, inter alia, on whether States were: "home States", where private security companies are registered or incorporated or where the management of such companies is primarily carried out;

[1] The report generally refers to "private security companies" rather than private military and security companies in the light of the large number of Member States that informed the Working Group that they did not have private military and security companies. Nevertheless, the Working Group has stressed that private security companies often carry out functions that can be deemed "military" and therefore can be considered private military and security companies. Some of the companies operating prisons and detention centres can fall into the category of private military and security companies by virtue of the types of services they provide in various operations around the world.

"contracting States" that directly contract the services of private security companies, including from private security companies that subcontract to other private security companies; or "territorial States", where private security companies operate, in relation to privatized prison and detention facilities. Several States responded to the questionnaires mostly by stating that they did not privatize places of deprivation of liberty. Civil society organizations working on issues related to prisons and detention provided important and useful information to the Working Group.

5. On 27 April 2017, the Working Group convened a public panel event and a private expert consultation with States and civil society organizations to discuss the subject of the present report. Representatives of more than 50 States participated in the panel event, along with representatives of civil society organizations, and mainly discussed the human rights challenges and risks of outsourcing prisons and detention facilities to private security contractors, and the measures required to ensure respect for the human rights of persons deprived of their liberty. The information obtained from the questionnaires, panel event and expert consultation contributed to the findings of the Working Group.

6. In the present report, the Working Group notes the necessity of distinguishing between, on the one hand, private companies that provide services such as medical services, food, and educational and vocational training to those held in places of deprivation of liberty and, on the other hand, those responsible for the operation of the facility itself. In some situations, the State authority operates a prison or detention facility by itself or in partnership with a private company.

7. As part of its work on assessing the regulation of private military and security companies, the Working Group undertook a global study over the past four years on national legislation relating to such companies. It has reviewed 60 countries in all regions,[2] and the findings have shown that national regulation of the private military and security industry is inconsistent. Further, robust safeguards against potential human rights violations by company personnel are lacking. The study showed worrying trends relating to significant gaps in penal accountability and civil liability of individuals and corporate actors engaged in the private military and security business. Given the likelihood of private military and security company personnel engaging in the use of force and being involved in hostilities, these gaps underscore real risks to human rights.

II. International legal framework

8. The rights of persons deprived of liberty are a special concern of international human rights law. The manner in which the State treats vulnerable members of society in its prisons and detention facilities has long been an issue that determines a State's compliance with its international human rights obligations.[3] Human rights instruments, including the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment and the United Nations Standard Minimum Rules for the Treatment of Prisoners, provide human rights guarantees concerning deprivation of liberty. Article 10 of the International Covenant on Civil and Political Rights, for instance, states that "all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person". Persons deprived of their liberty are also protected against torture or other cruel, inhuman or degrading treatment or

[2] See A/HRC/24/45, A/HRC/27/50, A/HRC/30/34 and A/HRC/33/43.

[3] Adam McBeth, "Privatising human rights: what happens to the State's human rights duties when services are privatized?", *Melbourne Journal of International Law*, vol. 5, No. 1 (2004).

punishment under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[4]

9. The Basic Principles for the Treatment of Prisoners also reaffirm the fundamental human rights accorded to persons deprived of liberty by declaring that "except for those limitations that are demonstrably necessitated by the fact of incarceration, all prisoners shall retain the human rights and fundamental freedoms set out in the Universal Declaration of Human Rights and, where the State concerned is a party, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights and the Optional Protocol thereto, as well as such other rights as are set out in other United Nations covenants". These fundamental human rights and freedoms include the rights to life; freedom of thought, conscience and religion; health; freedom from slavery; and physical and mental integrity of persons deprived of their liberty. The Human Rights Committee, in its general comment No. 21 (1992) on humane treatment of persons deprived of their liberty, clarified that States had a positive obligation toward persons who were particularly vulnerable because of their status as persons deprived of liberty. As such, treating all persons deprived of their liberty with humanity and with respect for their dignity was a fundamental and universally applicable rule. That rule must be applied without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

10. Human Rights Committee general comment 21 provides ample reference to various international standards applicable to the treatment of prisoners and detainees, be it in prisons, detention camps, correctional institutions or elsewhere.

11. Although the State ultimately has the obligation to respect, protect and promote the realization of human rights, there has also been growing support and acceptance by the international community of the principle that non-State actors, including business entities, must respect international human rights standards and obligations. International frameworks focused on the duties of States in respect of private operators, and comments and decisions by the Human Rights Committee and treaty monitoring bodies, are among efforts to extend the influence of international human rights law to non-State actors via the State. With regard to privatizing prisons, the Human Rights Committee clarified that the obligations of States in relation to the rights of prisoners extend to privately run institutions. The Committee expressed concern about the privatization of prisons and related services and the consequences for the ability of States to meet their human rights obligations.[5] Thus, in the case of privatized services, the State has a heightened duty of supervision, ensuring that private entities meet their obligations.[4] Further, the State is required to monitor privatized prisons and to intervene whenever necessary to protect the human rights of those deprived of their liberty, irrespective of the private operator's obligations.

12. The responsibility of corporations to respect human rights in their operations and business relationships is now a widely accepted concept. The Guiding Principles for Business and Human Rights[6] recognize both the existing obligations of States to respect, protect and fulfil human rights obligations, and the obligation of business entities to comply with and respect human rights standards in carrying out their operations.

[4] United Nations, *Treaty Series*, vol. 1465, No. 24841.

[5] See CCPR/CO/75/NZL and CCPR/C/79/Add.55.

[6] Available from www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf.

III. Inherent State functions and the growth of privatization

13. State outsourcing of social services has become a norm worldwide. Privatized prisons and detention facilities are now an international multibillion dollar industry involving private security companies that operate both domestically and transnationally. Human rights experts and civil society organizations have regularly expressed concerns regarding the outsourcing of inherent State functions, including prisons and detention facilities.

14. Case law has also been adopted against the privatization of prisons. The Supreme Court of Israel ruled against prison privatization in 2009, when it annulled a law that would have authorized the establishment of the country's first privatized prison. The Court held that the execution of governmental powers by prison staff employed by a for-profit organization violated prisoners' basic rights to liberty and human dignity.[7] The case against privatization was founded on the argument that a private entity employing governmental powers posed an unavoidable risk of an unjustified use of force and that the very culture of for-profit organizations created a risk of an abuse of power. The Court further stated that a person who was detained must not be subject to the use of coercive measures by employees of a private, for-profit corporation. The decision by the Supreme Court of Israel reflects the concerns that many have expressed about privatized prisons and detention facilities.

15. The privatized prison and detention industry nevertheless continues to grow, particularly in middle- to high-income countries.[8] In this regard, the Working Group received information concerning private security companies linked to the following countries, which are either home States, territorial States or contracting States: Australia, Austria, France, Nauru, Netherlands, New Zealand, Papua New Guinea, South Africa, Spain, United States of America and United Kingdom of Great Britain and Northern Ireland.[9]

16. Much of the information received by the Working Group referred to the situation in the United States, given the high rate of incarceration and the tremendous growth of private contractors in the prison industry in that country in the past 30 years. Three companies dominate the privatized prison industry in the United States: the Corrections Corporations of America, now known as CoreCivic; the Geo Group; and Management and Training Corporation. CoreCivic operates primarily in the United States, while the other two companies have transnational operations. In Europe, meanwhile, the companies G4S and Serco operate in places of deprivation of liberty, according to information received by the Working Group.

17. The Working Group notes that the privatization of prisons and immigration detention facilities is not limited to the countries mentioned above and private security companies. The human rights challenges presented by the privatization of prisons and detention facilities are an issue of global concern and are not limited to the countries and companies identified in the present report.

18. In the privatized prison sphere, policies that have resulted in a greater use of incarceration have increased support for the use of private security companies.

[7] Barak Medina, "Constitutional limits to privatization: the Israeli Supreme Court decision to invalidate prison privatization", *International Journal of Constitutional Law*, vol. 8, No. 4 (October 2010).

[8] Rob Allen, Director, Justice and Prisons, statement to the Working Group on the use of mercenaries panel on private military and security companies in places of deprivation of liberty and their impact on human rights (Geneva, April 2017).

[9] Michael Flynn, Director, Global Detention Project, statement to the Working Group on the use of mercenaries panel on private military and security companies in places of deprivation of liberty and their impact on human rights (Geneva, April 2017).

External corporate pressures ensure that private security companies running prisons and detention facilities are kept in operation and, more importantly, that there is a consistent, and even increasing, demand for their existence.

19. The following factors have contributed to the growth in privatization:[10] (a) an increase in the prison population, owing to changes in sentencing policy, such as the imposition of minimum sentences, the requirement that more time to be served before parole, and the rise of mass incarceration; (b) increased lobbying efforts by private companies, with the aim of obtaining more State contracts for privatized prisons and detention facilities; (c) overcrowding and the reluctance of States to allocate the funds needed to build new prisons; (d) an increase in the detention of irregular migrants; and (e) perceived need in times of crisis.

Privatized services

20. Privatization can involve a for-profit entity fully operating a prison or detention facility or a private company providing services to a State-operated facility. Some of these services include rehabilitative programmes and health, medical and educational services. The outsourcing of these subsidiary functions to private companies can also be challenging. For example, the outsourcing of prison telephone services can lead to prisoners or detainees paying grossly inflated rates as compared with average rates outside of prison. Privatized services thus need to be scrutinized to ensure that they are not exploitative.

21. Most human rights concerns in the privatization sphere, however, are linked to the enormous responsibility, discretion and power given to private security companies, which may lead to abuse in the use of force against prisoners and detainees. Some companies have the discretion, for instance, to make decisions that include lengthening a person's detention as punishment for committing infractions or transferring a detainee to solitary confinement for a duration of time determined by company personnel.[11] The Working Group noted that, in situations in which a privatized prison or detention facility was wholly or principally operated by a private security company, there were greater reasons for concern regarding human rights violations owing to the extent of control the company had over both the facility and detainees, as well as the lack of transparency and access to grievance mechanisms in such facilities.

IV. Human rights costs of privatization of deprivation of liberty

22. In the privatization context, States often attempt to meet their human rights obligations through the use of contractual conditions relating to the treatment of prisoners. In many cases, however, the contractual obligations of privatized prison operators are not aligned with internationally recognized human rights standards. When contractual obligations take into account international human rights standards, the implementation of these standards is often weak or absent. Human rights experts have expressed concern that "the profit motive of privately operated prisons ... has fostered a situation in which the rights and needs of prisoners and the direct responsibility of States for those they deprive of their freedom are diminished

[10] Ibid.; see also Carl Takei, staff attorney, American Civil Liberties Union, statement to the Working Group on the use of mercenaries panel on private military and security companies in places of deprivation of liberty and their impact on human rights (Geneva, April 2017).

[11] Jane Andrew, "Prisons, the profit motive and other challenges to accountability", Working Paper Series (New South Wales, Australia, University of Wollongong, 2006); and statements provided by civil society actors to the Working Group through the questionnaire.

in the name of greater efficiency".[12] Reports of frequent and serious human rights violations committed by private security companies and their personnel also suggest the absence of necessary and effective grievance mechanisms, accountability and remedies for human rights abuses.

A. Private versus public prison facilities

23. Human rights violations and abuses are not unique or specific to the privatized prison context. There is agreement, however, among several stakeholders that the very nature of the private sector in general, and privatized prison companies in particular, further increases the risk of human rights abuses and violations.[8] While operational difficulties and bad practices are not limited to privately run prisons, there are growing concerns about whether the need to make a profit pushes private companies to propose unrealistic bids in order to win contracts and to cut corners in delivering on them. A World Bank paper noted that there might be significant additional risks attached to privatized prisons in countries where robust legislative and regulatory frameworks were less developed or the application of such frameworks was weak.[13]

24. Some of the arguments against for-profit operations in privatized prisons and detention facilities highlighted the objective of such companies of cutting costs, leading to a decline in the quality or standard of services. Further, in some countries, people held in privatized prisons served longer terms of incarceration in comparison with in public facilities, owing to differences in how privatized prisons issued conduct violations to prisoners.[10] In 2016, the Deputy Attorney General of the United States, in a memo[14] to the acting director of the Federal Bureau of Prisons, noted that privatized prisons compared poorly with publicly operated facilities. They did not provide the same level of services, programmes and resources, did not save substantially on costs and did not maintain the same level of safety and security. Rehabilitative programmes, educational programmes and job training provided by the State, which were essential to reducing recidivism and improving public safety, were hard to replicate and outsource. The memo clarified the intention of the Government of the United States to reduce reliance on privatized prison operations. This position has since changed under the new Administration. Nevertheless, the Department of Justice memo highlighted some valid ongoing concerns regarding privatized prisons when compared with public prison facilities.

1. Profit motive: heightened risk of human rights violations

25. The financial incentives inherent in privatization undoubtedly risk economies being achieved through reductions in service, the number and quality of staff and the maintenance of physical infrastructure. The profit motive, efficiency concerns and a lack of accountability are some of the problematic realities of private operators that contribute to an increased risk of human rights violations and abuses. They also feed into each other: for example, the potential for contract management to align the profit motive with fulfilment of human rights obligations is undermined by a lack of information and procedural accountability.

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[12] *Capitalist Punishment: Prison Privatization and Human Rights*, Andrew Coyle, Allison Campbell and Rodney Neufeld, eds. (Atlanta, Clarity Press, and London, Zed Books, 2003), foreword.

[13] Rob Allen and Paul English, "Public-private partnerships in prison construction and management", Justice and Development Working Paper Series (Washington, D.C., World Bank, 2013).

[14] Available from www.justice.gov/archives/opa/file/886311/download.

26. Further concerns include a lack of transparency about what is happening in private security facilities. One of the criticisms of privatization is that companies are responsible to their shareholders, not to the public, and thus have little incentive to provide public information about their treatment of prisoners. Some privatized prisons have had violent incidents that were not recorded or were recorded as being less serious than they actually were. If prisons are financially penalized for such incidents, there is an incentive to underrecord them.[8]

27. Research suggests that there may be a financial incentive for the operators of privatized prisons to maximize the number of days served for each prisoner.[15] It found that inmates in privatized prisons were cited for twice as many conduct infractions as those in public prisons, resulting in longer stays.

28. Some private security companies contracting for privatized prisons with the State impose "occupancy guarantees", sometimes referred to as "lock-up quotas," which require the Government to either provide a certain number of prisoners on a daily basis or pay as though the empty prison beds were filled.[16] A 2015 report by In the Public Interest, a non-governmental organization, reviewed the contracts for 62 state- and county-level privatized prisons and jails in the United States and found that 41 (65 per cent of the total) contained a minimum occupancy guarantee. Those guarantees ranged from 80 to 100 per cent of capacity, with many around 90 per cent.[17] Occupancy guarantees improperly incentivize incarceration and discourage government officials from pursuing alternatives to detention and incarceration. The purpose of these guarantees is to protect the profit margins of private security and prison companies. They can also prevent private companies from suffering financial consequences for gross human rights violations. An example of this occurred in the United States, where state officials allegedly transferred around 138 prisoners out of a privatized prison in response to documented security failures. The privatized prison company used the 97 per cent occupancy guarantee in the contract to force the state to compensate the company for the empty beds, even though the beds had gone empty precisely because of the company's failure to manage the prison appropriately.[9]

29. The Working Group was also informed of situations in the United Kingdom concerning a private sector juvenile facility in which undercover cameras filmed abuse and its cover-up. Allegations included that the culture in the facility was "based on control and contract compliance rather than rehabilitation and safeguarding vulnerable young people".[18] Video footage of fight clubs in privatized prisons in New Zealand also led to the termination of a contract between the Government and an operator of privatized prisons.

30. Although human rights violations occur in public-run prisons and detention facilities, the mechanisms required to protect prisoners' human rights appear to be more robust in such facilities, likely owing to better control over the vetting and recruitment of personnel and more stringent grievance and complaint procedures. In short, there is less control that is founded in the rule of law when private operators are involved.

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[15] Peter Kerwin, "Study finds private prisons keep inmates longer, without reducing future crime" (10 June 2015). Available from http://news.wisc.edu/study-finds-private-prisons-keep-inmates-longer-without-reducing-future-crime.

[16] Takei, "Private military and security companies in places of deprivation of liberty".

[17] In the Public Interest, "Criminal: how lockup quotas and 'low-crime taxes' guarantee profits for private prison corporations" (September 2013). Available from www.inthepublicinterest.org/wp-content/uploads/Criminal-Lockup-Quota-Report.pdf.

[18] Medway Improvement Board, "Final report of the Board's advice to Secretary of State for Justice" (30 March 2016).

31. Ensuring even the most basic, commonplace forms of accountability has been problematic in privatized prisons. There have been difficulties ensuring access to quality information; it has been hard to ensure financial accountability because of the ways that contract fees have been structured; it has been difficult to monitor contract performance; and the processes for awarding, renewing and terminating contracts have presented difficulties that undermine the ability of the community to ensure public accountability.[11]

32. Privatized prison companies are reported to have profited handsomely through contracts negotiated with State authorities and thus have sought to exercise significant influence in lobbying State authorities for additional contracts. In some States, there appear to be recurrent "revolving door" situations in which public corrections personnel have left their positions to become private security company employees, further highlighting concerns regarding the profit focus within the private security industry and its influence among policymakers and State officials.

33. The Working Group has been informed of the use of force by private security personnel against prisoners and detainees that has resulted in grave injuries; medical neglect that has led to deaths; inhuman and ill-treatment; sexual violence and abuse; failure to enable or permit contact with the family members of detainees; insufficient care services; the arbitrary use of solitary confinement; and the imposition of quasi-judicial decisions that affect the legal status and well-being of prisoners or detainees.

34. The vetting and training of staff is reported to be poor in many privatized prisons. The profit motive encourages: cost cutting by hiring lower-paid — and thus less qualified — staff, including individuals with a past history of inmate abuse;[19] failure to respond to prisoner health and medical needs; and higher rates of involvement in serious and violent incidents than in government-operated facilities. The profit motive has also affected the appropriate provision of good quality food and medical care and services related to the education and training of prisoners.

35. Labour programmes in privatized prisons have also been punitive and exploitative, rather than rehabilitative, as prisoners may be forced to engage in low-paid or unpaid work in poor conditions without any meaningful impact on their skills and education. Researchers have found that there is a heightened risk that labour programmes in privatized prisons could amount to inhumane exploitation. Reports have shown that, in privatized prisons, inmates earn wages that are well below the minimum wage, in comparison with those in State-operated prisons, where inmates generally (though not always) receive the minimum wage for their work.[20]

36. In certain crises around the world, such as in occupied territories, the use of private security contractors to limit and prohibit people's right to liberty and free movement through deprivation of liberty is a means of deliberately undermining a people's right to self-determination. In the race for the maximum profit, private security companies have left many of their detainees in situations in which they have even been stripped of the will to live and, in some cases, have resorted to taking their own lives.[21] These situations have rendered the most basic yet

[19] Richard Kish and Amy Lipton, "Do private prisons really offer savings compared with their public counterparts", *Economic Affairs*, vol. 33, No. 1 (February 2013).

[20] Vicky Peláez, "The prison industry in the United States: big business or a new form of slavery?", *Global Research* (2016). Available from www.globalresearch.ca/the-prison-industry-in-the-united-states-big-business-or-a-new-form-of-slavery/8289.

[21] American Civil Liberties Union, "Warehoused and forgotten: immigrants trapped in our shadow private prison system" (June 2014). Available from www.aclu.org/other/warehoused-and-forgotten-immigrants-trapped-our-shadow-private-prison-system.

fundamental right to human dignity non-existent, and need to be effectively addressed.

2. Barriers to transparency and limited legal relief

37. The Working Group notes that, in privatized prisons, transparency in terms of information regarding prisoners, as well as the manner in which the company operates, is a serious challenge. Information on privatized prisons is often not available for public scrutiny, and companies often resist attempts to obtain disclosure of contractual information. When there are allegations of misconduct by personnel in privatized prisons, or by their supervisors or government officials charged with overseeing the contract of the privatized prison, enforceable mechanisms for accountability and remedy have been found wanting. Often, companies contracting with the State can be given immunity.[22] Complex contract arrangements between the State and the private security operator can make it more difficult to hold company management and public officials liable for human rights violations. The cost of obtaining legal assistance for persons deprived of their liberty is also a serious obstacle.

B. Immigration-related detention

38. A worrying political discourse about migration, a rise in anti-immigrant policies in various countries, an increase in the criminalization of undocumented migration and the imposition of mandatory and indefinite immigration detention all give rise to further human rights concerns. Immigration detention has also become a source of profit for multinational private security companies in a number of countries. In this context, many private security companies have acquired contracts to operate detention facilities for irregular or undocumented migrants.

39. Over the past three decades, the privatization of migrant detention has developed in an increasing number of European Union countries in various forms and degrees. States are increasingly looking to private security companies for detention centres and the escorting of deported migrants. Some States rely heavily on multinational private contractors to run immigration detention facilities.[23] States sometimes delegate the construction and operation of immigration detention centres, including offshore facilities on the territory of a third country, to private contractors. In some countries, the majority of immigration detention centres are run by private security companies, including multinational companies. In the United States in late 2016, 73 per cent of the approximately 40,000 migrants detained by the authorities were held in facilities operated by private companies.[16]

40. It has commonly been argued by advocates supporting the privatization of detention that outsourcing may invite competition, which can lead to improvement of service and reduction of costs. Various studies have concluded, however, that in reality the actual level of competition among private security companies in the context of immigration detention appears to be very limited. An analysis of these multinational corporations reveals that the phenomenon of privatization of immigration detention is concentrated largely among a few companies operating in a

[22] Takei, "Private military and security companies in places of deprivation of liberty"; see also United States of America, Supreme Court, *Minneci v. Pollard*, case No. 565 U.S. 118 (2012).

[23] Migreurop, "Migrant detention in the European Union: a thriving business-outsourcing and privatisation of migrant detention" (July 2016). Available from www.migreurop.org/IMG/pdf/migrant-detention-eu-en.pdf.

handful of countries.[24] In the United States, the market can be so concentrated that a single private security company runs all privatized prisons within a particular state.[25]

41. Although most of the issues and challenges related to for-profit contractors in the realm of immigration detention are similar to those outlined in the previous section, there are specific human rights costs. Reports from civil society organizations have highlighted serious complaints about the condition and treatment of migrants and asylum seekers in facilities run by private security operators.

42. These cases clearly demonstrate that private management of immigration detention gives rise to human rights violations, since the welfare and human rights of detainees are in conflict with companies' profit targets.[23] Indeed, it has been reasonably argued that a primary rationale for immigration detention is not to meet legitimate and limited aims of administrative detention, but to satisfy the profit motives of private companies.[26] In the present section, the report will highlight some of the human rights concerns related to privately run facilities, including inhuman conditions, neglect, lack of adequate physical and mental care of detainees, economic exploitation, restrictions on religious freedom, ill treatment, physical abuse, sexual assault, deaths in custody, lack of transparency, lack of access to legal representation and other due process violations.

1. Conditions and treatment

43. What seems to be a commonly shared conclusion of many studies is that for-profit companies will inevitably seek to cut costs and thus have an adverse impact on the conditions of detention for migrants and asylum seekers. Deterioration in living conditions, a decline in the quality of services and an increase in security risks seem to be unavoidable consequences of the desire to maximize profit. Often, a reduction in the budget is translated into understaffing, a shortage of food, reduced medical assistance and the hiring of unqualified and untrained personnel. Reports show that some privately run immigration facilities are routinely understaffed. Some facilities hire underqualified medical staff, leading to unnecessary delays in the treatment of individuals who need urgent medical attention.

44. With regard to the detention of children and families, in 2014, the Australian Human Rights Commission conducted a detailed inquiry into the practice in that country of contracting with Serco, a private security company, to hold children in immigration detention on Christmas Island. Among other things, the report identified numerous incidents of assault, sexual assault and self-harm involving children.[27] In the United States, the Karnes County Residential Center, run by the GEO Group, houses accompanied children with their female relatives. The facility is a secure lockdown detention centre run with a rigid schedule. The facility is not licensed for the care of children, however, and the guards are not trained to address the needs of either mothers and children seeking asylum or trauma survivors.[28]

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[24] See countries mentioned in para. 15.

[25] Megan Mumford, Diane Whitmore Schanzenbach and Ryan Nunn, "The economics of private prisons" (The Hamilton Project, 2016). Available from www.hamiltonproject.org/papers/the_economics_of_private_prisons.

[26] Flynn, "Private military and security companies in places of deprivation of liberty" (see footnote 9).

[27] Australian Human Rights Commission, *The Forgotten Children: National Inquiry Into Children in Immigration Detention 2014* (Sydney, 2014). Available from www.humanrights.gov.au/sites/default/files/document/publication/forgotten_children_2014.pdf.

[28] American Bar Association, "Family immigration detention: why the past cannot be prologue" (31 July 2015).

2. Sexual abuse

45. In recent years, reports have revealed inappropriate sexual behaviour by guards towards female detainees in immigration detention centres run by private security companies. Female detainees have allegedly been sexually abused by personnel of private security companies.[29] Detained women have felt vulnerable and isolated in these cases. In a particular immigration detention centre for women, run by a private security contractor in the United Kingdom, some detainees have reported being victims of rape and sexual violence.[30] The Special Rapporteur on violence against women, Rashida Manjoo, was denied entry to the facility to objectively seek information on violations reportedly being experienced by female detainees (A/HRC/29/27/Add.2, para. 29).

46. In the United States, an internal inspection body received reports of 13 incidents of sexual assault and abuse in a privately run immigration detention facility. The private security company notified the overseeing governmental agency of only one case, however.[31]

3. Misuse of solitary confinement

47. Reports show that solitary confinement is used as a form of disciplinary punishment or retaliation by personnel of private security companies in immigration detention facilities. In 2014, detainees in a facility run by a private security company went on hunger strike to protest poor conditions of confinement and indefinite detention. Personnel made the detainees believe that they had been invited to meet with the management of the facility to discuss their grievances; in fact, the detainees were escorted directly into solitary confinement cells without the promised meeting. They were finally released following intervention by civil society organizations.[16]

48. In some privately run facilities, solitary confinement cells are used as overflow housing. New arrivals are housed in such cells until they can be transferred elsewhere.[16] Individuals belonging to certain religious groups have complained that they are prohibited by personnel of private security companies from conducting their religious practices, including scheduled times for weekly prayers. Some detainees are placed in solitary confinement for saying their prayers quietly together. In some privately run facilities, the catering service fails to provide adequate food after sunset for individuals who fast during the day.[31]

4. Mistreatment and death in custody

49. Reports have documented the deaths of detainees in the custody of facilities operated privately for the United States Immigration and Customs Enforcement.[32] In the United Kingdom, there have been several deaths of asylum seekers and migrants in the custody of privately run facilities. Inquiries concluded that some of the deaths were a result of excessive use of force, neglect by guards or lack of appropriate

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[29] American Civil Liberties Union, "ACLU of Texas today files federal lawsuit on behalf of women assaulted at T. Don Hutto Detention Center", press release (19 October 2011). Available from www.aclu.org/news/documents-obtained-aclu-show-sexual-abuse-immigration-detainees-widespread-national-problem.

[30] Global Detention Project, "United Kingdom immigration detention profile" (October 2016). Available from www.globaldetentionproject.org/immigration-detention-united-kingdom-2.

[31] CIVIC and Detention Watch Network, "Abuse in Adelanto: an investigation into a California town's immigration jail" (October 2015). Available from www.endisolation.org/wp-content/uploads/2015/11/CIVIC_DWN-Adelanto-Report_old.pdf.

[32] Human Rights Watch, "US: deaths in immigration detention" (7 July 2016). Available from www.hrw.org/news/2016/07/07/us-deaths-immigration-detention.

medical treatment. In some cases, no explanation was provided for the death of the detainees.[23]

50. The Special Rapporteur on the human rights of migrants documented incidents of human rights abuses of refugees and asylum seekers, including children, by a private security company contracted by the Government of Australia to operate in offshore facilities in Nauru and Papua New Guinea (A/HRC/35/25/Add.3). The Working Group has transmitted communications to the respective Governments concerning allegations of human rights abuses committed by the private security company operating in the offshore facilities in Nauru and Papua New Guinea.[33]

5. Violations related to due process

51. Studies show that the release of an asylum seeker from detention before a final hearing greatly affects the chances of establishing the merits of an asylum claim, since a release allows for more time to prepare the claim and better and more frequent access to lawyers, witnesses, experts and translators, who can help prepare and document the case.[28]

52. A study conducted in the United States found that, for those migrants and asylum seekers who had legal representation and were not detained, the success rate of obtaining relief was 74 per cent, compared with an 18 per cent success rate for those who were legally represented but detained, and that the rate of successful outcomes for those who were detained and unrepresented was only 3 per cent. The study also concluded that legal representation was a deciding factor in whether an asylum seeker passed the mandatory screening interview and ultimately obtained asylum.[34]

53. While detention in general makes it difficult for migrants and asylum seekers to prepare their cases and establish the merits of their claims, individuals detained at privately run facilities face additional challenges in obtaining adequate legal services, owing to various obstacles, some of which seem to be uniquely associated with the for-profit nature of these facilities.

54. Many private immigration detention facilities are built in hard-to-reach and remote areas, including offshore locations. These remote locations make it difficult for migrants and asylum seekers to secure the paid or pro bono legal services to which they are entitled. Because of the long distance, detained persons sometimes cannot meet with their legal representatives on a regular basis, which significantly impedes their ability to prepare their cases.[23]

55. It has been argued that, even when lawyers are dedicated to traveling and visiting their clients who have been detained at remote facilities, further impediments exist. Reports show that some contractors impose arbitrary restrictions on legal visitation and the activities of counsel at detention facilities. Some facilities have adopted informal, often non-transparent and inconsistently enforced, policies that have made attorney-client communications and consultations difficult and time consuming.[23] In the United States, privately run facilities sometimes impose restrictive requirements on legal visitation that are not usually applied at State-run facilities. For example, a few immigration detention facilities run by private security companies require security clearance for law students who work as pro

[33] Available from https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=14026 and https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=13897.

[34] Steering Committee of the New York Immigrant Representation Study Report, "Accessing justice: the availability and adequacy of counsel in removal proceedings", *Cardozo Law Review*, vol. 33, No. 2 (December 2011).

bono legal volunteers. Some legal volunteers have been denied entry for no apparent reason, even though they had previously been approved for entry. Legal personnel have been denied access when they did not provide 24-hour advance notice of the specific detainees with whom they wanted to meet. In the same facility, pro bono attorneys have been refused food or water in the visitation room and further warned that, if they leave to get food, they will not be permitted to re-enter on the same day. As a result, one team of pro bono attorneys spent 11 hours without food or water in order to finish their work with detainees.[35] Some privately run facilities banned particular legal service providers from entry as a form of retaliation against criticism published by them about the facility or their participation in peaceful protests denouncing the facility.[36] All these practices create further barriers for the lawyers trying to gain access to their clients, which in turn undermines the detainees' due process rights to legal representation.

56. In addition, at some privately run facilities, legal personnel are often prohibited from bringing communication technology devices, such as mobile phones, laptops and Wi-Fi hotspot devices, into detention centres, although these devices are vitally important for developing the cases. These arbitrary policies, which are often not in line with the national standards, deny detainees the benefits of the full scope of available services that are available to non-detained clients of the same attorneys.[37]

57. Other unwarranted restrictions include limiting the access of lawyers to various records and documentation regarding the detainees, and limiting the amount of time that detainees can spend in law library.

58. The detention of migrants and asylum seekers in confined and prison-like facilities, in combination with these additional constraints imposed by private contractors, hinders the ability of detainees to access legal counsel, communicate with potential witnesses and benefit from the assistance of interpreters, among other things. It has a further negative effect on the capacity of migrants and asylum seekers to pursue legal relief based on the merits of their claims.

6. Economic exploitation

59. Cost cutting in privately run facilities comes mostly from a reduction in the number of staff, which are sometimes replaced by self-service systems or simply by detained migrants themselves. Although detained migrants or asylum seekers are generally not authorized to work, reports show that privately run immigration detention facilities sometimes hire detainees, on a voluntary basis, to conduct simple day-to-day tasks, such as cleaning and catering. In order to reduce the operational cost and maximize profits, detainees at for-profit facilities are paid less than the national minimum wage for their work. In the United Kingdom, detainees can be paid between £1 and £1.25 per hour, which is one-sixth of the hourly rate paid outside detention facilities for the same type of work.[38] In the United States, detainees at immigration detention facilities run by private contractors can be paid

[35] American Bar Association, "Family immigration detention: why the past cannot be prologue", sect. IV.B.2; see also, generally, United States, Immigration and Customs Enforcement, *Family Residential Standards*, sect. 5.8; see also United States, Immigration and Customs Enforcement, *Performance-Based National Detention Standards 2011*, sect. 5.7, available from www.ice.gov/doclib/detention-standards/2011/pbnds2011.pdf.

[36] Decl. of Victoria Rossi, *Flores v. Holder*, No. 2:85-cv-04544 (C.D. Cal. Apr. 22, 2015); see also Brad Tyer, "Paralegal blocked from Karnes Detention Center after Observer story", *Texas Observer* (27 March 2015). Available from www.texasobserver.org/paralegal-denied-access-to-karnes; and CIVIC and Detention Watch Network, "Abuse in Adelanto".

[37] American Bar Association, "Family immigration detention" (see footnote 28).

[38] Migreurop, "Migrant detention in the European Union" (see footnote 23).

only $1 per day. A bottle of mineral water at the commissary of the same facility costs more than that.

60. Telephone service provided at privately run immigration detention facilities is particularly expensive, with much higher rates than those charged outside the facility. The fact that mobile phones are confiscated from migrants and asylum seekers upon their arrival at the facility forces them to rely on the telephone service provided by the facility. The high price of telephone service obviously hinders the capacity of detained migrants and asylum seekers to communicate with their lawyers and families. This has a further negative impact on their capacity to pursue their asylum claims.

7. Lack of transparency

61. Immigration detention facilities run by private security companies have been criticized for their lack of transparency. It is generally observed that lawyers, journalists, civil society actors and independent monitoring bodies have less access to facilities run by private contractors than to public ones. While national laws often require public agencies to disclose their records to the public upon request, these laws are often not applicable to information in the possession of private actors. In the meantime, reports show that private security companies have spent a significant amount of money actively lobbying to defeat efforts to amend national legislation in this regard. Withholding information in the name of commercial confidentiality permits private contractors to place their own desire for business secrecy over the public interest. As a result, there is often less public scrutiny of these privately run facilities, while lack of transparency may cause detainees to be more at risk of abuse.

8. Implications for national legislation and national immigration policies

62. Control of detention facilities by private contractors causes perverse incentives that may lead to the detention of more people for longer periods of time. Multinational private security companies have a strong incentive to contribute to the public discourse regarding the normalization of detention of irregular migrants, to influence national immigration policy and to lobby for repressive national legislation to further criminalize the status of irregular migrants, including asylum seekers. As previously noted, many private security companies manage to include guaranteed minimum bed quotas in their contracts with Governments. In addition to the minimum bed quota, some companies offer a discount on the per diem rate for additional beds that exceed the minimum bed quota to encourage the contracting governmental agency to use the full capacity of the facility.

63. In the United States, critics have argued that privatized prison companies have sought to increase profits by influencing substantive criminal legislation in ways that would drive up the prison population. In situations in which private contracting companies receive payment based on the number of prisoners they oversee, incentives would likely push them to use political leverage to ensure that their detainee population is as high as possible.[39] In the 100 days after the executive orders regarding immigration enforcement priorities were signed by President Donald Trump, United States Immigration and Customs Enforcement said that it had arrested more than 41,000 people, an increase of 37 per cent over the same period during the previous year.[40]

[39] Allard K. Lowenstein International Human Rights Clinic, Yale Law School, "Inherently governmental functions and the role of private military contractors".

[40] United States, Immigration and Customs Enforcement, "ICE ERO immigration arrests climb nearly 40%", available from www.ice.gov/features/100-days.

V. Challenges for accountability and remedies

64. When private actors operate detention facilities, questions often emerge about who has effective control over detainees and who should be held accountable when human rights abuses occur. Governments have at times tried to use the privately operated nature of facilities as a shield to protect themselves from being liable for violations.[41] It has been observed that outsourcing the operation of places of deprivation of liberty seems to serve the political interests of some States, insofar as it allows those States to dilute the responsibility of public authorities vis-à-vis detention facilities and the rights violations they generate.[42]

65. Individuals held at many facilities run by private security companies often cannot appeal grievance decisions made by the warden, who is normally an employee of the company. The lack of the ability to appeal to a public official is likely to impede accountability for human rights abuses.[43] In order to fulfil contractual obligations and avoid financial sanctions and any legal liability, private security companies have a strong incentive to underreport incidents of abuse and, in some cases, manipulate the reporting of the circumstances of these events. The inherent unreliability of self-reporting, in combination with the lack of transparency of privately run facilities, results in human rights abuses and violations that are committed by private security company personnel remaining unknown to the public.

66. Even when abuses and violations have been disclosed by civil society, including the media, no real sanctions seem to have been imposed on the company, other than the reputational attack that the private security company may suffer in certain cases. Specific cases have established that private contractors have greater immunity from liability than their government counterparts.[44]

67. Reports show that many private security companies do not face serious consequences when they fail to meet the terms of their contracts. Despite reports of abuses, some private security companies keep running the facilities where the abuses have occurred. For example, one facility received a passing grade even after having failed a mandatory component of the annual performance evaluation. In the same place, after it was found that the death of a detainee had been preventable, inspectors determined that the facility was in compliance with the applicable medical standard.[45]

68. Privatization of detention has made it more difficult to investigate and prosecute alleged human rights abuses and violations. For instance, in the context of immigration detention, victims and witnesses are often deported or threatened with deportation after having reported abuses.[46]

[41] Flynn, "Private military and security companies in places of deprivation" (see footnote 9).

[42] Migreurop, "Migrant detention in the European Union" (see footnote 23).

[43] Takei, "Private military and security companies in places of deprivation of liberty" (see footnote 16).

[44] United States, Supreme Court, *Minneci v Pollard* (see footnote 22) and *Correctional Services Corp. v. Malesko*, case No. 534 U.S. 61 (2001).

[45] CIVIC and Detention Watch Network, "Abuse in Adelanto" (see footnote 31).

[46] Migreurop, "Migrant detention in the European Union (see footnote 23)"; see also Mark Townsend, "Serco, the Observer, and a hunt for the truth about Yarl's Wood asylum centre", *The Guardian* (17 May 2014). Available from www.theguardian.com/uk-news/2014/may/17/serco-yarls-wood-asylum-centre.

VI. Conclusions and recommendations

Conclusions

69. **While privatization of deprivation of liberty may not be a violation of international law per se, it is essential to consider that outsourcing creates great risks for the violation of human rights, including impediments to accountability and remedy for victims. Simply put, in matters of deprivation of liberty, the profit motive is incompatible with, and will normally override respect for, human rights in the absence of strict regulation. Nevertheless, States will likely continue to contract with private security companies in the operation of prisons and detention facilities.**

70. **The Working Group notes the importance of exercising due diligence by both States and private security companies to safeguard against potential human rights violations. Due diligence requires that the private security company actively seek information about the negative human rights impacts of its activities, as well as about the risk that negative human rights impacts might occur in the future. This triggers a responsibility by the company to mitigate potential or existing violations, and to remediate previous violations.**[47]

71. **In the light of the need to strengthen accountability frameworks for those deprived of their liberty in privately operated facilities, the Working Group notes the importance of States ensuring that private operators comply with human rights obligations.**[48]

72. **An analysis of the struggles of victims for accountability and remedy against private security companies proves that voluntary codes, human rights due diligence and other voluntary measures, while essential, are themselves not sufficient to hold companies accountable or provide a means of redress. Measures must be mandatory, judicially enforceable and backed up by meaningful sanctions.**

Recommendations to States

73. **In the light of the human rights challenges in the context of privatized places of deprivation of liberty, the Working Group makes the below recommendations to States.**

74. **States should terminate the practice of outsourcing the overall operation of prisons, jails, immigration detention facilities and other places of deprivation of liberty to for-profit private security companies.**

75. **For States that continue to contract out certain responsibilities in the context of deprivation of liberty, certain functions should not be outsourced to private security companies, including the punishment of disciplinary infractions by detainees, the computation of sentences, the placement or release of detainees and the granting of temporary leave, where applicable.**

76. **In the context of global migration trends, States should consider community-based alternatives, which are likely to be more economical and**

[47] Mark B. Taylor, "Human rights due diligence: the role of States — 2013 progress report", (International Corporate Accountability Roundtable, 2012). Available from https://static1.squarespace.com/static/583f3fca725e25fcd45aa446/t/58657c1d9f7456750f7ae707/1483045919859/1 AR-Human-Rights-Due-Diligence-2013-Update-FINAL1.pdf.

[48] See CCPR/CO/75/NZL and CCPR/C/79/Add.55.

effective than deprivation of liberty. The Working Group stresses that detention should be used as a last resort and under the least restrictive means possible, particularly for individuals belonging to vulnerable groups, such as children, women and asylum seekers.

77. **When considering the involvement of private actors in providing services in places of deprivation of liberty, States should conduct a full analysis of the infrastructure and processes required by their justice systems in order to meet international human rights norms and standards. Through legislative measures, States should ensure that private security companies and their personnel are in compliance with relevant international human rights standards.**

78. **States should ensure that legislation and contracts between public agencies and private security companies include sufficiently detailed obligations with respect to international human rights standards. Such contracts should set up a clear delineation of responsibilities, including regular reporting requirements and robust monitoring provisions, and should also set forth effective means for addressing contractor non-compliance, up to and including contract cancellation.**

79. **States should impose contractual obligations, on private service providers or as part of the provision of subsidies or financial incentives for private operators, to work towards continual improvement in the realization of human rights when such a course would not otherwise be profitable. For example, private firms running prisons or detention centres might be offered bonuses under their contracts with the Government for facilitating ongoing medical, social or human rights training for their staff, with a view to improving the rights of inmates.**[49]

80. **It is essential for States to establish effective accountability, oversight and remedy mechanisms when contracting with private security companies in places of deprivation of liberty. Both private security companies and their personnel must be subject to civil liability and penal accountability for violations of human rights. Such civil and criminal accountability must be judicially enforceable and not subject to State or other immunities.**

81. **States should provide meaningful oversight of detention operations involving private security companies through an on-site presence at facilities of governmental officials who are authorized to intercede quickly and as often as necessary, and ensure that effective compliance mechanisms are in place to track performance and outcomes and make reliable information readily available to the public.**

82. **States should establish external monitoring and inspection mechanisms and not rely solely on inspections conducted by the governmental agency contracting with a particular private security company. A body fully independent of the contracting agency should carry out regular inspections. Reports of the inspections should be made public.**

83. **States should ensure that records maintained by private security companies that provide services in places of deprivation of liberty are subject to freedom-of-information laws to the same extent as public entities.**

84. **States should facilitate independent examination of allegations of abuse at places of deprivation of liberty run by private security companies, ensure that all complaints are thoroughly investigated and ensure effective remedies to**

[49] Ibid.

victims of human rights violations committed by private security companies and their personnel.

85. The Working Group notes the importance of strong national legislation that provides for effective remedies for victims of human rights violations committed by private security company personnel, particularly when such companies and personnel operate transnationally. In this regard, States should take all measures necessary to ensure the legal liability of companies based in or managed from the State party's territory regarding human rights violations as a result of their activities conducted abroad or the activities of their subsidiaries or businesses. National legislation should contain extraterritorial provisions, which can facilitate the prosecution of private security companies and their personnel.

86. Notwithstanding the importance of national legislation and strong contractual obligations that incorporate international human rights standards, the Working Group, through its global study on national laws, has noted the need for a comprehensive legally binding instrument to regulate private military and security companies in the diverse contexts in which they operate. Such an instrument would ensure consistent regulation worldwide and adequate protection of the human rights affected by these companies. An international binding instrument would provide a standard regulatory framework and a single dedicated body on various essential issues related to the activities of private military and security companies, ensure the accountability of these companies and their personnel, and guarantee the right to effective remedies for victims wherever they are in the world.

Recommendations to private security companies and States

87. In the light of the human rights challenges in the context of privatized places of deprivation of liberty, the Working Group makes the below recommendations to private security companies and States.

88. Contracts for private security companies operating in places of deprivation of liberty should adhere to international human rights standards, particularly the United Nations Standard Minimum Rules for the Treatment of Prisoners. These include rules regarding the treatment of detainees and prisoners, the recruitment of trained and skilled personnel, and inspections and contact with the outside world.

89. Contracts with private security companies should comply with regular reporting and robust monitoring requirements set out in their contracts, which should also set forth effective means for addressing contractor non-compliance, up to and including contract cancellation.

90. Private security companies need to comply with due diligence rules, which require them to assign investigative responsibility within their organization for the detection and investigation of human rights violations. Companies should also create mechanisms that provide protections for whistle-blowers.

91. Companies should cooperate fully with any external monitoring and inspection mechanisms established to oversee their operations.

92. Private security companies should publicly disclose records with regard to their contracts and operations, to the same extent as public entities with similar functions.

93. **Companies should establish effective accountability, oversight and remedy mechanisms, including non-judicial remedies, for victims of human rights violations. Contracts and legislation must not make exhaustion of contractual and non-judicial remedies a precondition of resort to judicial enforcement of accountability and remedy.**